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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 988

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY,
Petitioner (Libellant-Appellee),

against

THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK,
Respondent (Respondent-Appellant).

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This case involves mainly questions of fact.

These facts are clearly set forth in the Opinion of the Circuit Court of Appeals.

The petitioner had a choice of taking either one of two principal classes of Protection and Indemnity insurance policies.

(1) It could have taken out an "all-risk" policy, which would cover the actual fault or privity of the assured and the acts or neglect of itself and the managing officers of its organization.

"All-risk" protection and indemnity policies are regularly issued for an appropriate premium.

Sorenson v. *Boston Insurance Co.*, 20 F. (2d) 640;

Eagle, Star & British Dominions Ins. Co. v. *Moore,* 9 F. (2d) 296;
Hanover Fire Ins. Co. v. *Merchants Transp. Co.,* 15 F. (2d) 946.

(2) Instead of taking out an "all-risk" policy, which it now endeavors to persuade this Court it did take out, the petitioner took out a "limited" policy, the material provisions of which are as follows (Italics ours):

> "The Assurers hereby undertake to make good to the Assured or the Assured's executors, administrators and/or successors, all such loss and/or damage and/or expenses as the Assured, *without their actual fault or privity,* shall have become liable to pay and shall pay as shipowners or as having an interest in the vessel named herein on account of the liabilities, risks, events, happenings and/or occurrences herein set forth:
>
> (1) Liability for loss of life of, or personal injury to, or illness of, any person, * * *
>
> (2) Liability for hospital, medical, or other expenses necessarily and reasonably incurred in respect of loss of life of, personal injury to, or illness of any member of the crew or any other person. * * *
>
> (8) Liability for loss of, or damage to, or in connection with cargo or other property, including mail and parcel post, including baggage and personal effects of passengers, * * *
>
> (14) Costs, charges, and expenses, reasonably incurred and paid by the assured in defense against any liabilities insured against hereunder in respect of the vessel named herein, * * *
>
> General Conditions and/or Limitations
>
> * * * that in respect of any occurrence likely to give rise to a claim under this policy, the Assured

are obligated to and shall take such steps to protect his (and/or the assurers') interests as would reasonably be taken in the absence of this or similar insurance.

The Assurers shall not be liable to the Assured for any loss, damage, or expense to which the Assured, or the managing officers of his organization are privy, or which arises from his or their act or neglect." (Italics ours.)

Throughout its petition and accompanying brief petitioner refers constantly to the words "actual fault or privity" in the first paragraph of the policy and completely ignores or passes over the following provision in this policy:

> "The Assurers shall not be liable to the Assured for any loss, damage or expense to which the Assured or the managing officers of his organization are privy, or which arises from his or their act or neglect."

Thus there is no important question of insurance law involved. We are not dealing with a "standard form" of policy fixed by law or practice. Individual provisions of Protection and Indemnity policies are regularly changed to meet the varying needs of the owners. Risks to be covered and the premium to be paid are subject to negotiation between the parties.

For an appropriate premium an "all-risk" protection and indemnity policy could have been obtained by the petitioner and can be obtained by any shipowner today who is willing to pay the additional premium to cover the additional risks.

This case concerns only the litigants involved.

The petitioner asks this Court to construe the words in its limited policy, to wit, without "*actual fault or privity*"

and without *"the act or neglect"* of the managing officers of the assured's organization, to mean "something in the nature of fraud on its part, e.g., some willful or deliberate wrong". Petition, p. 20.

No authority is cited for this startling contention and obviously the words "actual fault, privity, act or neglect" mean something less than fraud.

The fact that the policy in this case was for four million six hundred thousand dollars is of no significance, because loss or damage to cargo due to negligence in care, custody or stowage might easily exceed that amount. Furthermore, loss of life in a collision case, both to the persons on board the *Morro Castle* and on another large ocean liner, might easily produce claims running into millions. If, by negligent navigation, the *Morro Castle* had sunk the *Queen Mary* with loss of two to three thousand lives, obviously, a policy for $4,600,000 would be hopelessly inadequate in amount. In both these instances as well as many others the policy would cover.

The concurrent Findings of both Courts establish the following breaches of the Safety Statutes and Regulations of the United States:

1. A continuous failure over four years to divide the sailors into equal watches, in breach of U. S. C. Title 46, §673. For text, see Appendix A.

2. A continuous failure over four years to hold fire and boat drills as required by U. S. C. Title 46, §481, and Supervising Inspectors Ocean and Coastwise Rule 5, subdivision 18. For text, see Appendix A.

3. A continuous failure over four years to make the entries in the log books with respect to Fire and Boat Drills as required by U. S. C. Title 46, §481

and Supervising Inspectors Ocean and Coastwise Rule 5, subdivision 18. For text, see Appendix A.

4. A continuous failure over four years to provide proper watchmen as required by U. S. C. Title 46, §470, and Supervising Inspectors Ocean and Coastwise Rule 5, subdivision 25. For text, see Appendix A.

5. A continuous failure over four years to take any measures whatsoever to see that the Safety Statutes and Regulations were observed.

The concurrent Findings of both Courts were that at 2.10 a.m. on September 8, 1934, a small fire was discovered in the writing room of the *Morro Castle.*

Owing to the fact that the so-called "watchmen" were not on watch, that the sailors who were required by law to be on watch were not on duty, and that no adequate fire or boat drills to train the crew for the emergency of fire had ever been held on the *Morro Castle,* nothing was done to put the small fire out until about 3:00 a. m., when the fire had progressed to a point where it was seen by the First Mate of the *Andrea F. Luckenbach,* which was three to four miles away.

The concurrent Findings of both Courts were that the loss of the vessel, together with the loss of life and cargo thereon, was caused by the breaches of the Safety Statutes and Regulations mentioned above.

Both the District Court and the Circuit Court of Appeals held that the burden of proving that the losses in question were caused without actual fault or privity and without the act or neglect of any of the managing officers of the assured's organization, was on the assured. That ruling was clearly right:

Richelieu & Ontario Navigation Co. v. *Boston Marine Insurance Co.,* 136 U. S. 408;

Carles v. *Travelers Insurance Co.*, 238 A. D. (N. Y.) 43;
Western Assurance Co. v. *J. H. Mohlman Co.*, 83 Fed. 811;
Sohier v. *Norwich Fire Insurance Co.*, 11 Allen (Mass.) 336.

There were three managing officers of petitioner's "*organization*".*

1. Franklin D. Mooney, President of the petitioner.
2. Henry E. Cabaud, Vice President.
3. Thomas S. Torresson, Marine Superintendent.

The Circuit Court of Appeals found all three men guilty of privity and neglect.

Whether they were or were not guilty of privity and neglect was a simple question of fact decided against the petitioner in the Circuit Court of Appeals, which petitioner obviously wishes to reargue in this Court.

Both Mooney and Cabaud are conceded to be managing officers and both were found guilty of privity and neglect.

With respect to Torresson the claim is made that he was not a "*managing officer of assured's organization*" within the meaning of the policy. That Torresson was not an executive officer of the corporation was not disputed, but that he was a managing officer of the assured's "organization" was clearly shown by the nature of his duties.

In its opinion, the Circuit Court of Appeals made the following statement with respect to Torresson:

* The words of the policy are "managing officers" of assured's "*organization*" not company or corporation. See p. 3 hereof.

"Torresson, who had offices on the dock, testified that his duties were to superintend the maintenance of the ship and its equipment, and to see that the laws and regulations with respect to the seaworthiness, fire protection, and safety of passengers and crew were obeyed. Libellant claims that his duties did not bring him within the language in question, which, it asserts, extended only to the executive officers of the company, chosen by the directors to carry out their policies. * * * A marine superintendent who visits the vessel each time it docks, and who is the only shore official having immediate contact with the particular vessel and its officers, would seem to be the direct representative of the owner so far as safety regulations are concerned. At any rate, he is the only one; if not he, then no one has such functions."

That Torresson, as the manager of the marine operations of the petitioner, was a managing officer of its organization within the meaning of the policy was clearly shown by the authorities.

Craig v. *Continental Ins. Co.* (1891), 141 U. S. 638;

Boston Towboat Co. v. *Darrow-Mann Co.*, 276 Fed. 778;

The Erie Lighter 108, 250 Fed. 490;

The Horaisan Maru, 5 F. Supp. 311, reversed on other grounds, 73 F. (2d) 526; cert. den. 295 U. S. 736;

Spencer Kellogg & Sons, Inc. v. *Hicks, Administratrix, et al.*, 285 U. S. 502;

The Calvert, 37 F. (2d) 355, modified on another ground, 51 F. (2d) 494;

In re Jeremiah Smith & Sons, Inc., 193 Fed. 395;

The Galileo, 54 F. (2d) 913, aff'd 287 U. S. 420;

The Princess Sophia, 61 F. (2d) 339.

Even if Torresson's part in this disaster be disregarded altogether, petitioner is still confronted with the fact that the Circuit Court of Appeals found both Cabaud and Mooney, admittedly managing officers of assured's organization, to have been negligent.

Strangely enough, petitioner, overlooking its contention that only some act equivalent to fraud would bar a recovery under the policy in litigation here, concedes at page 23 of its petition that Torresson's negligence would have barred a recovery under the 1935 policy which was taken out after the fire. Petitioner's claim is not that negligence of the managing officers did not bar a recovery under the terms of the policy here in question, but that Torresson was not a managing officer and hence not a person whose negligence barred a recovery.

On petitioner's own statement, therefore, any contention that only fraud bars a recovery under the policy can be eliminated.

In its petition and brief, petitioner states that an examination of the log books by Cabaud and Torresson would not have disclosed that the Safety Statutes and Regulations were being continually breached. Petitioner refers to a finding by Judge Goddard in its favor on this point. The sole basis of Judge Goddard's finding was a statement to this effect by the petitioner in its brief in the District Court. When the log books were produced in the Circuit Court of Appeals, and specific pages pointed out to the Circuit Court of Appeals, they specifically reversed Judge Goddard on this point and found that an examination of the logs, which were equally open to Cabaud and Torresson, clearly disclosed the breaches of the Safety Statutes and Regulations.

As the Circuit Court of Appeals pointed out, the use of fourteen seamen on daytime maintenance work, instead of

dividing the crew into night watches against the emergency of fire, was a matter of economy. The same is true with respect to the so-called "watchmen", who were in reality night stewards serving drinks to passengers or sailors engaged in cleaning and repair work.

The Circuit Court of Appeals obviously did not believe that these matters of economy in hiring men originated with the crew, rather than with the management. As the opinion states, "All these offenses were serious, flagrant, and long-continued. It is almost past belief that they could have escaped the notice of the managing officers of the company; * * *"

In the event that this Court grants this petition, two further questions will have to be considered which were not passed on by the Circuit Court of Appeals:

(1) The effect of the criminal conviction of the petitioner and Cabaud under Title 18 U. S. C., §461, Criminal Code §282, for "knowingly and wilfully" causing the deaths of upwards of 100 persons,* and

(2) Whether the holding of the District Court to the effect that the liability to passengers imposed on a shipowner by R. S. 4493, Title 46 U. S. C., §491, was not subject to limitation under R. S. 4283-4289, Title 46 U. S. C. § §183-189, if there was no privity on the part of the shipowner.

The question of the effect of the criminal conviction of the assured and its managing officer Cabaud was not part of the decision below. It was discussed by Judge Clark in an addendum to the opinion and by Judge A. N. Hand in a concurring opinion.

* For Text of this Statute see petition p. 9.

Similarly, the question of whether the Limitation of Liability Statute, now Title 46 U. S. C., § §183-189, which was last passed prior to this disaster on June 26, 1884, U. S. C., §189, was not repealed by R. S. 4493, Title 46 U. S. C., §491 which had been passed on February 28, 1871 was not dealt with by the Circuit Court of Appeals.

Judge Goddard in the District Court fell into the error of deciding that an earlier statute had repealed a later statute by failing to observe the dates on which the two statutes had been passed and by relying merely on the sections of the Revised Statutes, without observing that the Limitation Statute in its present form had been enacted after the statute which it was claimed had repealed it.

The Petition should be denied.

Respectfully submitted,

Cletus Keating,
Arthur M. Boal,
James H. Herbert.